

D.P.U./D.T.E. 96-25-B

Petition of Massachusetts Electric Company and Nantucket Electric Company, pursuant to General Laws Chapter 164, §§ 76 and 94, and 220 C.M.R. §§ 1.00 et seq., for review of its electric industry restructuring proposal.

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I. INTRODUCTION

On July 14, 1997, the Department of Public Utilities, now the Department of Telecommunications and Energy ("Department") approved an offer of settlement ("Settlement") of electric industry restructuring issues, including the provisions of a wholesale rate stipulation and agreement ("Wholesale Settlement") submitted by Massachusetts Electric Company ("MECo") and Nantucket Electric Company ("Nantucket") (together, "Companies").¹

¹ The original Settlement was submitted to the Department on October 1, 1996. On January 14, 1997, the Companies submitted amendments to the Settlement intended to address concerns raised by the Department ("January 14, 1997 Amended Settlement"). On February 13, 1997, the Companies submitted revisions to the January 14, 1997 Amended Settlement intended to address concerns raised by members of the Massachusetts Legislature. The Settlement was originally approved by the Department on February 26, 1997. On May 28, 1997, the Companies submitted an amended wholesale stipulation and agreement ("Amended Wholesale Settlement") to the Federal Energy Regulatory Commission ("FERC") for review, and the Companies filed an amended offer of settlement ("May 28, 1997 Amended Settlement"), which included the Amended Wholesale Settlement, with the Department for review. The Department

Massachusetts Electric Company, D.P.U. 96-25-A (1997). On November 25, 1997, the Massachusetts Legislature enacted "an act relative to restructuring the electric utility industry in the Commonwealth, regulating the provision of electricity and other services, and promoting enhanced consumer protection therein" ("Act"), St. 1997, c. 164. On December 10, 1997, the Companies submitted a filing with the Department to implement the Act ("December 10, 1997 Filing").

approved the May 28, 1997 Amended Settlement on July 14, 1997. On November 25, 1997, the FERC approved, subject to a compliance filing, the Amended Wholesale Settlement. See Docket No. ER97-678-000 for New England Power Company ("NEP"), the Companies' wholesale affiliate; see also, Docket No. ER97-680-000 for NEP's Rhode Island retail affiliate, Narragansett Electric Company.

Pursuant to notice duly issued,² the Department received comments on the Companies' December 10, 1997 from the Office of the Attorney General for the Commonwealth ("Attorney General") and the Massachusetts Division of Energy Resources ("DOER") jointly, the Conservation Law Foundation ("CLF"), and Enron Capital and Trade Resources, Inc. ("Enron"), all parties to the D.P.U. 96-25 proceeding.

II. DECEMBER 10, 1997 FILING

A. Introduction

The Companies' December 10, 1997 Filing contains two parts. First, the Companies request that the Department find that the Settlement, as approved on July 14, 1997, substantially complies with or is consistent with the Act and should be allowed to be implemented. Second, the Companies have proposed several modifications to the Settlement in response to certain sections of the Act. The Companies request that the Department find that the proposed modifications substantially comply with or are consistent with the Act and should be approved.³

² On December 8, 1997, the Department issued a notice to the service list in the D.P.U. 96-25 proceeding, indicating that the Companies would be submitting a filing pursuant to the Act, and requesting comments by December 17, 1997.

³ The Companies have submitted retail delivery tariffs for Massachusetts Electric Company, M.D.P.U. 964-D through 974-D, 978-B, and 981 with an effective date of

The Companies request that the Department allow the Settlement to be implemented in accordance with its terms, even if there are disputes about the proposed modifications to the Settlement approved by the Department. The Companies state that although the modifications are not necessary to reach a finding that the Settlement is in substantial compliance or consistent with the Act, they should be implemented to assure the Companies' restructuring plan substantially complies or is consistent with the Act on a prospective basis.

B. Scope of Review

The scope of this order addresses the Companies' request that the Department find that the Settlement, as approved, substantially complies or is consistent with the Act and should be allowed to be implemented. In a subsequent order, the Department will address the proposed modifications to the Settlement.

C. Companies' Position

The Companies state that the Settlement contains the elements specified for a restructuring plan under the Act (December 10, 1997 Filing Letter at 3). Specifically, the Companies state that the Settlement (1) provides for a ten percent rate reduction, (2) is designed

March 1, 1998. The Companies state that Nantucket Electric Company tariffs would be submitted following review of this and other related proceedings.

to implement a restructured electric generation market, (3) provides customers with retail access, (4) includes an estimate and detailed accounting of total transition costs eligible for recovery, (5) sets forth a description of the strategies to mitigate such transition costs, (6) includes unbundled prices or rates for generation, distribution, transmission, and other services, (7) documents the proposed charges for recovery of transition costs, (8) includes proposed programs to provide universal service for all customers, (9) includes proposed programs and recovery mechanisms to promote energy conservation and demand-side management, (10) sets forth procedures for ensuring direct retail access to all electric generation suppliers, and (11) discusses the impact of the plan on the Companies' employees and the communities served (id. at 3-4). In addition, because its non-nuclear generating facilities will be sold to an unaffiliated third party after a competitive auction or sale, and the proceeds from the sale will be applied to reduce the amount of the Companies' transition costs, the Companies contend that the Settlement is consistent with the divestiture requirements of the Act, St. 1997, c. 164, ' 193, subsection 1A(b)3 (id. at 3-4).

The Companies contend that because the Settlement substantially complies with or is consistent with the Act and fully meets the rate reduction targets established by the Legislature, the Department should (1) make the express finding that the Settlement substantially complies or is consistent with the provisions of this chapter, (2) decline to impose any requirement for the Companies to file a new plan, (3) allow the Settlement to be implemented on March 1, 1998 and (4) find that the Settlement satisfies the requirements of St. 1997, c. 164, ' 193, subsection 1G (id. at 4).

III. COMMENTS ON THE DECEMBER 10, 1997 FILING

A. The Attorney General and DOER

The Attorney General and DOER note that among other things the Settlement provides for retail choice on or before March 1, 1998, unbundled rates, a standard transition service that will deliver ten percent rate reductions relative to the 1997 rates, divestiture of non-nuclear generating facilities, an ongoing process in which to evaluate the reasonableness of the Companies' mitigation efforts, and a discussion of the impact of the plan on the Companies' employees and communities served by the Companies (Attorney General/DOER Comments at 2). The Attorney General and DOER submit that the broad terms of the Settlement are completely consistent with the overall thrust of the Act and, all but for a small number of terms setting forth implementation details, are fully compliant (id.).

The Attorney General and DOER contend that the December 10, 1997 Filing includes certain program and rate design modifications established by the Act (id.). The Attorney General and DOER contend that because modifications were contemplated by the Settlement, such modifications do not nullify the Settlement (id.). Accordingly, the Attorney General and DOER contend that the Department should find that the Settlement substantially complies with or is consistent with the G.L. c. 164, as amended (id.).

B. CLF

CLF's comments focus on demand-side management and renewable energy project provisions of the Act (CLF Comments at 1). CLF states that the Act's provisions regarding demand-side management and renewables not only specify funding levels, but also establish

clear policy requirements and directions for their implementation (id.). CLF contends that substantial compliance requires the adoption of the funding levels and policy implementation measures for demand-side management and renewables specified by the Act (id. at 2).

C. Enron

Enron contends that the Settlement, as previously approved and supplemented by the December 10, 1997 Filing, does not substantially comply and is not consistent with the most important provisions of the Act (Enron Comments at 2). Enron states that the agreement between New England Power Company ("NEP") and USGenNE, Inc. ("USGenNE"), which imposes a backstop obligation on all NEP units purchased by USGenNE to provide power to the Companies' standard offer customers at a fixed wholesale prices, precludes the possibility that NEP will maximize the value of existing generating facilities being sold under the divestiture plan (id. at 2-3). Enron also contends that the agreement between NEP and USGenNE provides USGenNE with incentives to mitigate above-market power purchase agreements but offers ratepayers no opportunity for savings associated with mitigation efforts (id. at 5-6).

Finally, Enron contends that the proposed treatment of proceeds from the divestiture of NEP's generation assets fails to comply with the Act (id. at 7). Specifically, the provision of the Settlement, as modified by the October 1, 1997 divestiture filing,⁴ amortizing the residual value credit over a two and one-half year period denies ratepayers a significant reduction in the

⁴ In D.P.U. 97-94, NEP proposes a two and one-half year reimbursement schedule rather than the twelve-year reimbursement schedule required in the Settlement.

transition charge while the New England Electric System, NEP's holding company, could invest the unreimbursed portion of the divestiture proceeds (id.). In addition, Enron contends that the provision in the Settlement which provides an economic incentive for taking steps to mitigate transition costs does not inure to the benefit of ratepayers and is not consistent with the Act (id. at 7-8).

IV. STANDARD OF REVIEW

The Department has broad authority to regulate the ownership and operation of electric utilities in the Commonwealth. See, e.g., G.L. c. 25, ' ' 5, 9, 18, 19, and 20; c. 111, ' ' 5K and 142N; and c. 164, ' ' 1 through 33, 69G through 69R, 71 through 75, and 76 et seq. This authority was most recently revised and augmented by the Act. The primary goal of the Act is to establish a new electric utility "framework under which competitive producers will supply electric power and customers will gain the right to choose their electric power supplier" in order to "promote reduced electricity rates." St. 1997, c. 164, ' 1.

Among other things, the Act authorizes and directs the Department to "require electric companies organized pursuant to the provisions of [G.L. c. 164] to accommodate retail access to generation services and choice of suppliers by retail customers, unless otherwise provided by this chapter. Such companies shall file plans that include, but shall not be limited to, the provisions set forth in this section." St. 1997, c. 164, ' 193, subsection 1A(a). Pursuant to its statutory authority, the Department will review a Company's restructuring plan for compliance with applicable provisions of the Act.

The Act sets forth explicit directions for the Department's review of restructuring plans.

Plans must contain two key features. They must provide, by March 1, 1998, a rate reduction of 10 percent for customers choosing the standard service transition rate from the average of undiscounted rates for the sale of electricity in effect during August 1997, or such other date as the Department may determine. Id. Each plan must be designed to implement a restructured electric generation market by March 1, 1998, and each electric company must offer retail access to all customers as of that date. Id.

Plans must also include the following important attributes:

- (1) an estimate and detailed accounting of total transition costs eligible for recovery pursuant to St. 1997, c. 164, ' 193, subsection 1G(b);
- (2) a description of the company's strategies to mitigate transition costs;
- (3) unbundled prices or rates for generation, distribution, transmission, and other services;
- (4) proposed charges for the recovery of transition costs;
- (5) proposed programs to provide universal service for all customers;
- (6) proposed programs and recovery mechanisms to promote energy conservation and demand-side management;
- (7) procedures for ensuring direct retail access to all electric generation suppliers; and
- (8) discussions of the impact of the plan on the Company's employees and the communities served by the Company.

St. 1997, c. 164, ' 193, subsection 1A(a).

The Act directs the Department to allow the implementation of plans filed before the enactment date: "An electric company that has filed a plan which substantially complies or is

consistent with this chapter as determined by the department shall not be required to file a new plan, and the department shall allow such plans previously approved or pending before the department to be implemented." Id. The Department will take these statutory directives into account in determining whether a plan should be approved for implementation.

In determining whether a plan substantially complies or is consistent with Chapter 164, the Department will consider in toto the stated purposes and goals of the Act as enumerated and declared by the General Court. See, e.g., Sterilite Corp. v. Continental Casualty Co., 397 Mass. 837, 839, n.3 (1986). The plain language of the statute gives the Department broad discretion to implement those stated purposes and goals and a mandate to do so in a timely manner, consistent with the General Court's declaration of the Act as an emergency law, necessary for the immediate preservation of the public convenience:

The deferred operation of this act would tend to defeat its purpose, which is to establish forthwith a comprehensive framework for the restructuring of the electric utility industry, to establish consumer electricity rate savings by March 1, 1998, and to make other changes in law, necessary or appropriate to effectuate important public purposes.

St. 1997, c. 164, Preamble.

The statute directs the Department to approve any plan that was filed before enactment, provided it "substantially complies or is consistent with this chapter." St. 1997, c. 164, ' 193, subsection 1A(a). An action "substantially complies" if it achieves "compliance with the essential requirements" of the statute. Black's Law Dictionary, Sixth Edition (1991). An action that is compatible with and not contradictory of a statute is "consistent" with the statute. Id. The use of these terms in the disjunctive compels the conclusion that the General Court has given the Department considerable discretion to effect the important public purposes of the Act.

In setting the standard of review, the Legislature recognized that one settlement had already been approved and that others settlements were pending before the Department.⁵ Therefore, in order to retain the value of extensive negotiated settlements among a divergent group of signatories, the Legislature did not require strict compliance with every particular of the Act; instead it stated that these settlements must be evaluated based upon consistency with or substantial compliance with the Act. To be approved as substantially compliant, a settlement need not comply strictly point by point with the Act, but must, on the whole, achieve compliance with the essential requirements of the statute. In short, the Legislature was aware of two points when it passed St. 1997, c. 164: (1) The three settlements were negotiated by essentially the same set of negotiators and achieved remarkable congruence on fundamental points that were later featured in the Act; yet (2) there were numerous company-specific divergences in details among the settlements, and between the settlements and the Act.

Against this background, the Legislature directed the Department to achieve retail access

⁵ At the time of enactment, the Department had approved this Settlement. In addition, Eastern Edison Company and Boston Edison Company had filed offers of settlement, which were under Department review.

within three months and granted the Department broad authority to assess the settlements for substantial compliance or consistency with the terms of the Act. Because the phrase "substantially complies or is consistent with" is imprecise, the Department supplements its understanding of these words in the statute (customarily, "the principal source of insight into legislative purpose," Bronstein v. Prudential Insurance Co., 390 Mass. 701, 704 (1984)), with a consideration of "the statute's purpose and history." Sterilite, 397 Mass. at 839. A more limiting interpretation would defeat the Act's purposes and fail to give "a fair consideration of the conditions attending its passage." Fickett v. Boston Fireman's Relief Fund, 220 Mass. 319, 320 (1915). Further, the Legislature intended that the Department move with dispatch to review the settlements already filed by declaring the Act to be an emergency law. The Legislature established March 1, 1998 as the retail access date and clearly contemplated that the Department complete its review of settlements expeditiously. Accordingly, it granted latitude to review for substantial, rather than precise, compliance with the Act. The Act further refined the scope of the Department's already broad authority with respect to restructuring and the recovery of stranded costs. That authority was vested in the Department by the Legislature before the passage of the Act. See, e.g., Massachusetts Institute of Technology v. Department of Public Utilities, 425 Mass. 856, 867 (1997) (recognizing authority of Department to allow recovery of stranded costs as implicit in its broad authority). Therefore, we must consider the settlement and make a determination whether it satisfies, on the whole, the stated goal and main features of the Act.

In this case, the Companies have filed a restructuring plan in the form of a settlement.

The General Court was aware of the features of this and other electric restructuring settlements in its deliberations leading to the Act's passage. In assessing the reasonableness of an offer of settlement, the Department reviews the entire record as presented in a company's filing and other record evidence to ensure that the settlement is consistent with applicable law, including relevant provisions of the Act, Department precedent, and the public interest. Berkshire Gas Company, D.P.U. 96-92, at 8 (1996); Boston Gas Company, D.P.U. 96-50, at 7 (Phase I) (1996); Massachusetts Electric Company, D.P.U. 96-59, at 7 (1996). A settlement among the parties does not relieve the Department of its statutory obligation to conclude its investigation with a finding that a just and reasonable outcome will result. Essex County Gas Company, D.P.U. 96-70, at 5-6 (1996); Fall River Gas Company, D.P.U. 96-60, at 5 (1996).

In assessing whether an electric company's proposed settlement of restructuring issues is consistent with applicable law and Department precedent, the Department will consider whether the settlement is consistent with the overall goal and principles for restructuring that were established in the Act and the Department's two major restructuring orders, Electric Industry Restructuring, D.P.U. 95-30 (1995), and Electric Restructuring Plan: Model Rules and Legislative Proposal, D.P.U. 96-100 (1996), to the extent the terms of those orders are not superseded by the Act. A plan, filed as a settlement, that strikes an appropriate balance among the various competing interests in electric restructuring, and that achieves an orderly transition, all consistent with applicable law, Department precedent, and the public interest, should be approved for implementation.

V. ANALYSIS AND FINDING

The Settlement is designed to provide customers with a choice of generation suppliers and a ten percent rate reduction on the retail access date (Exh. MEdCo-11, vol. 1, at 3). This is consistent with the Act's two key features: to implement a restructured electric generation market, including retail access by March 1, 1998, and to provide prescribed rate reductions.

With respect to the Act's requirements to provide an estimate and detailed accounting of total transition costs eligible for recovery and proposed charges for recovery of such transition costs, the Settlement sets forth rates and other terms for the termination of an all-requirements service contract, including supporting documentation for a contract termination charge to recover stranded costs (id. vol. 2, at 4). Therefore, the Settlement is consistent with respect to these requirements of the Act.

With respect to the Act's requirement to provide a description of the strategies to mitigate transition costs, the Settlement includes a commitment, and NEP has submitted a plan, to divest its generation business (id. vol. 1, at 30). Because NEP's non-nuclear generating facilities will be sold to an unaffiliated third party after a competitive auction or sale, and the proceeds from the sale will be applied to reduce the amount of the Companies' transition costs, the Settlement is consistent with the divestiture requirements of the Act, and mitigation of such transition costs.

With respect to the Act's requirement to present unbundled prices, the Settlement includes unbundled prices or rates for generation, distribution, transmission, and other services. This is consistent with the Act's requirement to include unbundled prices.

With respect to the Act's requirement to provide proposed programs for universal

service, the Settlement includes the provision of a standard offer transition service and proposed programs for default service and the protection of low income customers (id. vol. 1, at 7-20).

This is consistent with the Act's requirement to provide universal service to all customers.

With respect to the Act's requirement to include recovery mechanisms to promote energy conservation and demand-side management, and programs for renewable technology, the Settlement contains provisions for the development of, and budgeting for demand-side management programs and clean renewables technologies (id. vol. 1, at 25). This is consistent with the Act's requirement to include recovery mechanisms to promote energy conservation and demand-side management, and programs for renewable technology.

With respect to the Act's requirement to provide procedures for ensuring direct retail access to all suppliers, the Settlement contains provisions to allow customers to purchase from alternative suppliers, and to extend the benefits of competition to all customers (id. vol. 1, at 20). This is consistent with the Act's requirement to set forth procedures for ensuring direct retail access.

Finally, the Settlement contains provisions for employee severance and retraining, and provisions for payments in lieu of property taxes to the cities and towns in which NEP owns generation facilities (id. vol. 2, at 53-54). This is consistent with the Act's requirement to discuss the impact of the plan on the Companies' employees and the communities served.

The Attorney General and DOER point out that the Settlement contains all the elements specified for a restructuring plan by the Act, and state that the Department should find that the Settlement substantially complies and is consistent with the Act. With respect to the concerns

raised by the Attorney General and DOER, and CLF regarding the proposed modifications to the Settlement, the Department has indicated that it will address these issues in a subsequent order. Concerns raised by CLF regarding implementation of demand-side management will be addressed in a review of the Companies' five-year energy efficiency plan, D.P.U. 97-77.

Therefore, these concerns are not addressed here.

Enron contends that the backstop obligation on all NEP units purchased by USGenNE to provide power to the Companies' standard offer customers at a fixed wholesale prices precludes the possibility that NEP will maximize the value of existing generating facilities being sold under the divestiture plan. The Department must separate Enron's contention as a provision of the Settlement from the substantive issue of whether the provision has, in fact precluded NEP from maximizing the value of existing generating facilities. The Settlement requires the Companies to provide standard offer service through a transition period, by putting the supply for standard offer service out to bid. NEP's backstop obligation provides an assurance that the Companies would have a source of supply available for standard offer service. As a provision of the Wholesale Settlement, the backstop obligation is consistent with the Act's requirement to provide a standard offer transition rate, while allowing the Companies to provide universal service and the required rate reduction.

The issue of whether the backstop obligation has precluded NEP from maximizing the value of existing generating facilities is at issue in the Department's review of the divestiture plan. Enron has submitted testimony in the Department's review of the divestiture plan to support its contention, and the Department will address Enron's concern. The outcome of the

effect of the backstop obligation does not need to be decided to determine that the provision is consistent with the Act. As a provision of the Settlement, it is. It is unclear, at this time, what effect the backstop obligation has had on the value of NEP's generating facilities.

Enron also contends that the agreement between NEP and USGenNE provides USGenNE with incentives to mitigate above-market power purchase agreements, but offers ratepayers no opportunity for savings associated with mitigation efforts. The Settlement provides that NEP will endeavor to sell, assign or otherwise dispose of its power contracts. This provision of the Settlement is consistent with the Act's requirement that an electric company seeking to recover transition costs take all reasonable steps to mitigate to the maximum extent possible any such transition cost including good faith efforts to renegotiate, restructure, reaffirm, terminate, or dispose of existing contractual commitments for purchased power.

Enron seeks to review substantive issues regarding the agreement between NEP and USGenNE in the Department's review of whether the Settlement substantially complies or is consistent with the Act. Enron also has raised this issue in the Department's review of the divestiture plan, and the substantive issue is more appropriately decided in that proceeding. Enron's substantive concern regarding the agreement between NEP and USGenNE does not make the provision of the Settlement that requires NEP to endeavor to sell, assign or otherwise dispose of its power contracts inconsistent with the Act. As noted, above, the provision of the Settlement that requires NEP to endeavor to sell, assign or otherwise dispose of its power contracts is consistent with the Act.

Finally, Enron has raised a concern that the proposed treatment of proceeds from the

divestiture of NEP's generation assets fails to comply with the Act. The Wholesale Settlement provides that NEP shall implement a residual value credit with proceeds from the sale of its generating facilities as a direct offset to the transition charge. This provision of the Wholesale Settlement is consistent with the Act's requirement that all proceeds from any such divestiture and sale of generating facilities, net of tax effect and less any other adjustments approved by the Department that inure to the benefits of ratepayers shall be applied to reduce the amount of the selling electric company's transition costs. As provisions of the Settlement, they are consistent with the Act. Enron has appropriately raised its substantive concerns regarding the amortization schedule for the residual value credit, and the economic incentive to mitigate transition costs in the context of the Department's review of the divestiture plan.

On the whole, the Settlement achieves compliance with the essential requirements of the Act, and satisfies the stated goals and main features of the Act. Accordingly, the Department finds that the Settlement is consistent with or substantially complies with the Act.

VI. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That the Settlement approved by the Department on July 14, 1997 substantially complies or is consistent with the Act; and it is

FURTHER ORDERED: That the tariffs submitted on December 10, 1997:
M.D.P.U. 964-D through 974-D, 978-B, and 981 for Massachusetts Electric Company; be and
hereby are DISALLOWED.

By Order of the Department,

Janet Gail Besser, Acting Chairman

John D. Patrone, Commissioner

James Connelly, Commissioner